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Issue Date: 29 April 2003

CASE NO.: 2002-LHC-435

OWCP NO.: 7-142098

IN THE MATTER OF

TED W. ANTHONY
Claimant

v.

TTC ILLINOIS, et al
Employers

CREDIT GENERAL INSURANCE CO., et al
Carriers

DECISION AND ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING CLAIM FOR LACK OF JURISDICTION

Background

This Longshore and Harbor Workers' Compensation Act (Act) claim has been pending before the Office of Administrative Law Judges for more than a year. The claim has been set for formal hearing four times. During this period, Ted W. Anthony (Claimant), has filed several LS-203's identifying additional potential parties, and he also has filed suit in a Louisiana State Court where he now seeks a summary decision declaring himself to be a Jones Act seaman.

The identity and status of all the parties to the claim before this office are in a somewhat state of confusion. A number of the potential employers are insolvent, as are several of the potential carriers, and other carriers deny they provide coverage for the incident given rise to this claim. Notwithstanding this fact, however, on March 11, 2003, Louisiana Insurance Guaranty Association (LIGA) filed a Motion for Summary

Judgment urging (1) Claimant is not a longshoreman covered under the Act; (2) there exists other viable insurance coverage which eliminates LIGA's responsibility for this claim and (3) the value of TTC Illinois (TTC), a named Employer, exceeds the statutory maximum requiring LIGA's participation. [1]

After numerous correspondence and telephonic conferences with all apparent potential parties, a deadline of April 18, 2003, was established for receipt of responses to LIGA's pending Motion for Summary Judgment. As of that deadline, Claimant responded urging denial of the motion and/or delay until the State Court makes a ruling on the issue of Claimant's status; Louisiana Workers' Compensation Corporation (LWCC) responded urging the granting of LIGA's motion concerning Claimant's lack of status under the Act; and Logistic Services, Inc., responded urging denial of LIGA's attempt to avoid responsibility should Claimant be found to be covered under the Act.[2]

Facts

Claimant, who was employed by Crane Operators, Inc. (COI), alleges he was injured aboard the derrick crane barge "FRANK L" on or about November 11, 1996. TTC allegedly served as the payroll employer for COI and insurance was allegedly provided by Credit General Insurance Company (CGI).[3]

Regardless of the status of these parties, it is uncontroverted that at the time of Claimant's accident he was a crane operator foreman assigned to the derrick barge "FRANK L" as well as a fleet of other sister barges including the "Emery B," "Agnes B," "Patty Ryan," and "Big Sam." In the last year of Claimant's employment, however, 90 percent of his time was spent on the FRANK L. The barge transported a crane which was used to unload ocean going cargo vessels on the Mississippi River. The FRANK L had navigational lights, was assigned a Coast Guard number and

[1] By letter dated March 26, 2003, the net worth of TTC was withdrawn for now as an issue.

[2] Although all parties did not avail themselves of the opportunity to respond, their failure does not prevent the determination of the issue of Claimant's status under the Act as raised by LIGA's motion.

[3] Based on information and belief gained from the various telephonic conferences, apparently TTC is in bankruptcy, CGI is in liquidation and COI is insolvent.

subject to the Coast Guard regulations and inspection. It was moved from job to job by tug boats and once there, the FRANK L was secured alongside the cargo vessel where it moved back and forth as its crane assisted in the loading and/or unloading of the cargo vessel. The FRANK L contained sleeping, bathing and cooking quarters. If the work extended overnight, crew members could sleep aboard. On occasion, Claimant and the other crew members rode on the barge as it was moved from place to place.

When not in use, the FRANK L was usually moored at the Market Street Wharf; and at the time of Claimant's alleged injury on November 11, 1996, it was so moored and Claimant was performing general maintenance preparing the crane for the next job. His injury occurred as he pulled cable from a drum. This cable was used by Claimant and other crew members to secure the FRANK L alongside vessels that were being loaded and/or unloaded.

Claimant's primary job on the FRANK L was that of a crane operator. Claimant and his co-worker, Kevin Baye, took turns operating the crane. Baye was the second operator and Claimant was the working foreman. All work Claimant performed was on the deck of the barge. If he was not operating the crane he would tie barges, move the crane up and down the vessels, load and hook up equipment as well as perform maintenance on the crane such as greasing the fittings, checking and rigging cable and taking on fuel and water.

In November of 1999, Claimant filed a lawsuit in the Civil District Court for the Parish of Orleans against Ryan-Walsh, Inc., SSA, Inc., and Crane Operators, Inc., involving the same accident which gives rise to this longshore claim. In that suit, which is brought as a Jones Act claim, Claimant alleges he was injured on November 11, 1996, while working aboard the derrick barge FRANK L where he was regularly assigned as a crane operator.

In furtherance of that lawsuit, Claimant has filed in the State Court a Motion for Summary Judgment seeking to establish, as a matter of law, his status as a seaman under the Jones Act. The motion alleges that Claimant was regularly assigned to the FRANK L, a vessel registered with the U. S. Coast Guard and engaged in navigation and maritime commerce, as a crane operator foreman contributing to the mission and function of the vessel while moored to ocean going ships and river barges during cargo transfer. When Claimant was not operating the crane and transferring cargo, he alleges

that he regularly performed the other duties of a seaman. In support of his position concerning his seaman's status, Claimant relies on the Fifth Circuit decision of his co-worker, Kevin Baye, with whom he shared crane operator duties on the FRANK L. See *ENDEAVOR Marine, et al v. Crane Operators, Inc., et al,* 234 F.3d 287 (5th Circuit 2000). In furtherance of his state court motion, Claimant also filed the following "Statement Of Uncontested Issues Of Fact": [4]

> At all material times, Anthony was a crew member assigned to operate the cranes aboard these vessels. As the crane operator foreman, Plaintiff's duties include operation of the crane, maneuvering it fore and aft along the deck tracks of the barge and then operating the controls to perform cargo transfers between barges and ships. During these cargo operations, he would frequently alternate with Kevin Baye, who was the "second operator" of the FRANK L. The third crew member was an oiler.
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> When not engaged in transfer operators, Anthony performed routine seaman duties, such as line handling, mooring the barges and ship, mooring line inspections, general maintenance, taking on fuel and water and similar duties.
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> Anthony was injured on November 11, 1996 while employed in the course and scope of his assignment as crew member of the FRANK L.
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> At all material times, the FRANK L (and the other three barges) were engaged in navigation and commerce on the Mississippi River and used to load and unload vessels

[4] In addition to his pleadings from the state court proceedings, Claimant's counsel also furnished the opposition to Claimant's state court motion filed by the named defendants in that litigation. The principle argument urged in those defensive pleadings was Claimant's seaman status should be resolved by a jury (finder of fact in that case) because the FRANK L has not been determined to be a vessel in navigation and because Claimant was injured while performing general maintenance on the FRANK L while it was moored to the Market Street Wharf.

calling at various ports and locations in the Mississippi River.

Discussion

Claimant's counsel is correct in his assertion that though the Longshore Act and the Jones Act provide mutually exclusive remedies, until an award is made in one forum or the other an employee need not make a choice and is allowed to simultaneously pursue both remedies. See *Southwest Marine v. Gizoni,* 112 S.Ct. 486 (1991). Claimant has pursued both remedies in this instance, and although he has stipulated to and argued vigorously in State Court that the FRANK L was a vessel engaged in navigation and marine commerce, he is unwilling to make any such acknowledgment in the claim pending before this office. Rather, Claimant argues that insufficient evidence has been presented for me to make a summary factual determination that the FRANK L was a vessel in navigation. I do not agree.

The inquiry before me is whether Claimant is considered a seaman and therefore excluded from receiving compensation under the LHWCA pursuant to §902(3)(G) of the Act. To be classified as a seaman the following criteria must be met. First, the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission. Second, a seaman must have a connection to a vessel in navigation that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latisis,* 515 U.S. 347 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991). "The key to seaman status is an employment-related connection to a vessel in navigation. . . . It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337, 26 BRBS 75 (CRT)(1991). The legal tests for determining whether claimant is a "member of a crew" or a "seaman" are the same. *Id.*

Prior to his 1996 injury on the FRANK L[5], Claimant's fellow co-worker, Kevin Baye, had shared the exact same crane operator job duties with Claimant on the exact same derrick barge, the FRANK L. Both men alternated duties with each other, and the only distinction with the events of their accidents was Baye was struck by a mooring line while working aboard the FRANK L alongside another vessel and Claimant was pulling cable while the barge was docked awaiting a job assignment.

[5] Both men were injured in 1996, Claimant in November, and Baye in April.

The relevance of this distinction is immaterial, however, since each was doing the ship's work at the time of injury.

Noting the two prong test in *Chandris*, the Fifth Circuit in Mr. Baye's case reached the following conclusion concerning Mr. Baye's status:

> [5][6][7] Turning to the facts of this case, it is undisputed that Baye's duties contribute to the function and the mission of the FRANK L. Thus, the first prong of the *Chandris* test us satisfied. With respect to the second prong of *Chandris,* as previously noted, it is undisputed that the FRANK L qualifies as a "vessel in navigation." Further, as noted by the district court, Baye's connection to the FRANK L was substantial in duration given that he spent almost all of his time working on the vessel in the eighteen months prior to his accident. Thus, the sole question before this court, as well as the sole question presented below, is whether Baye has an "employment-related connection" to the FRANK L that is "substantial in terms of . . . its nature." *Chandris*, 515 U.S. at 368-69, 115 S.Ct. 2172.
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> After examining the record evidence and considering Baye's entire "employment-related connection" to the FRANK L, we must conclude that Kevin Baye's connection to the FRANK L is substantial in nature and that Baye is a Jones Act seaman as a matter of law. First, Baye was permanently assigned to the FRANK L and, as mentioned above, had spent almost all of the prior eighteen months on the vessel. Second, Baye's primary responsibility was to operate the cranes on board a vessel whose sole purpose is to load and unload cargo vessels. (FN4) Third, in the course of his employment, Baye was regularly exposed to the perils of the sea. For these reasons, we conclude that Baye was a Jones Act seaman as a matter of law.

The only essential element lacking in the *ENDEAVOR* decision is a specific finding that the FRANK L was "a vessel in navigation" since that issue was "undisputed" in Mr. Baye's case. Consequently, while I do not agree with Claimant's argument that I need to view his entire employment record, since 90 percent of his last working year spent on the FRANK L was a substantial connection to that barge, I do agree that I need to make a determination whether the FRANK L was a vessel in navigation in order to determine if Claimant was a seaman under the Jones Act and thus excluded from coverage under the Act.

Two make such a determination, a two prong test was articulated by the Supreme Court in *The Robert W. Parsons*, 191 U.S. 17 (1903). *See also*, *Manuel v. P.A.W. Drilling and Well Services, Inc.*, 135 F.3d 344 (1998). First, what is the purpose for which the craft was constructed. Second, what is the business in which the craft was engaged.

According to *Manuel*, ordinarily the determination of whether a craft is a vessel is a matter of law; and to assist in that determination the Court instructed "that special purpose structures such as jack-up rigs, mobile submersible drilling barges, derrick barges, spud barges and others are vessels as a matter of law, even though they also served, in part, as work platforms." Having so stated, the Court in *Manuel* went on to point out, unlike other floating craft that do not qualify as vessels, these special purpose vessels ". . . exhibit a common theme: Despite the outward appearance of the structure at issue, if a primary purpose of the craft is to transport passengers, cargo, or equipment from place to place across navigable waters, then that structure is a vessel." [6]

Applying the law of the Fifth circuit, I find that the derrick barge FRANK L was designed and utilized for the special purpose of transporting equipment (crane) from place to place across navigable waters and thus was a vessel in navigation. Though, of course, the FRANK L served also to support the crane, it nevertheless had the function of transporting it across navigable waters to sites that could not be reached by

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[6] *See also, Bernard v. Bennings Construction Co., Inc.*, 741 F.2d 824 (5th Cir. 1984) for the proposition that the "term vessel has generally been defined broadly and, in its traditional sense, refers to structures designed or utilized for transportation of passengers, cargo or equipment from place to place across navigable waters."

land based cranes. Consequently, based upon the undisputed facts, the ruling and reasoning of the Fifth Circuit in *ENDEAVOR* and my determination of the status of the FRANK L, it is my finding that Claimant's duties contributed to the function of the FRANK L, a vessel in navigation; that Claimant's connection with the FRANK L was substantial in duration given he had been assigned to the vessel for 90 percent of the one year preceding his accident; that Claimant's employment-related connection with the FRANK L as a crane operator furthered the purpose of the vessel which was to provide a crane to load and unload cargo vessels; and, lastly, that Claimant's employment upon the FRANK L exposed him to the perils of the sea. For these reasons, I find Claimant was a Jones Act seaman as a matter of law at the time of his November 11, 1996, accident, and I grant LIGA's Motion for Summary Judgment in that regard.[7]

ORDER

Claimant's claim for benefits under the Act is DENIED for lack of jurisdiction.

So ORDERED this 29th day of April, 2003, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:kw

[7] This ruling moots the need for me to determine whether LIGA had insurance responsibility under the Act. Also, the ruling denies Claimant's request that I withhold deciding LIGA's motion until the State Court makes a determination of Claimant's status. I see no reason in staying my docket awaiting a ruling that is not binding on the issue pending before me, particularly in view of the fact that I, as trier of fact, require no further evidence to make my determination..